REGULATION OF PROPERTY AND CASUALTY INSURANCE RATES IN OHIO

MICHAEL D. ROSE*

I. INTRODUCTION

Currently a considerable amount of attention is being focused on property and casualty insurance,[1] particularly the mass market personal lines, which include private passenger automobile, homeowners, multiple line,[2] and fire coverage. In fact, the insurance enterprise has become a matter of national attention, with changes to the system of property and casualty insurance being proposed and investigated by virtually every group affected.[3] One area of widespread concern is regulation of property and casualty insurance rates[4]—an area controlled almost exclusively by the states[5] pursuant to the McCarran-Ferguson Act.[6]

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1 Based on annual premiums paid, the most significant lines of "property and casualty" insurance include automobile liability, physical damage, and injury; fire, extended coverage, and allied lines (including coverage for damage caused by lightning, smoke, water, windstorms, hail, explosions, sprinkler leakage, and earthquakes); multiple peril (including package policies covering numerous lines for homeowners and businesses); inland marine transport insurance; and miscellaneous lines such as products liability and medical malpractice. *See* Rose, *State Regulation of Property and Casulty Insurance Rates*, 28 OHIO ST. L.J. 669-70 (1967). Other phrases used to describe this class of insurance include "property and liability insurance," "fire, marine, and casualty insurance," "non-life insurance," and "fire and casualty insurance." *See* 1 BULLETIN OF COMMISSION ON INSURANCE TERMINOLOGY OF AMERICAN RISK & INSURANCE ASSOCIATION 5-6 (March 1965).

2 "Multiple line" refers to coverage which includes protection against loss of property belonging to the insured as well as protection against financial loss resulting from liability of the insured to someone else. 2 BULLETIN OF COMMISSION ON INSURANCE TERMINOLOGY OF AMERICAN RISK & INSURANCE ASSOCIATION 4 (July 1966).

3 *See, e.g.*, H.R. REP. NO. 815, 90th Cong., 1st Sess. 76-95 (1967). As one executive of a major insurance company has remarked: "[T]he consumer is not satisfied with what he gets for his insurance dollar compared with what he gets for his other dollars." Gibson, *Our Economic Imperative: Increasing the Marginal Utility Per Dollar of Private Insurance*, BEST'S REVIEW, June 1969, at 16 (property-liability ed.).

4 Technically, "rate" refers to price per unit of exposure, while "premium" refers to the total charge for coverage. For example, in fire insurance the unit of exposure is stated in terms of $100 of insured value for one year. If the rate is 50 cents per $100 of insured value, the annual premium for a $10,000 structure would be $50. However, the terms "rate" and "premium" are commonly used interchangeably or together.

5 For a discussion of the foundations of state regulation, *see* Rose, *supra* note 1, at 670-73, 679-86, 693-95.

6 15 U.S.C. §§ 1011-15 (1964). Section 1012 of the McCarran-Ferguson Act provides, in part:

> (a) The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ;

Over two decades have elapsed since the State of Ohio enacted its rate regulatory laws. When enacted, these laws were recognized as an experiment, subject to change as experience dictated.[7] It would therefore seem incumbent upon the state to review periodically its laws and practices for regulating property and casualty insurance and to implement changes if appropriate.[8] This article traces the development of and analyzes the existing regulatory pattern in Ohio, considers the aims of rate regulation, indicates why and in what ways the system is not working well, and analyzes proposals for change.

II. History of Ohio Regulation

The present system of property and casualty insurance rate regulation in Ohio reflects the historical development of industry practices and regulatory responses. Today, as in the past century, statutory and administrative regulation reflect little more than stopgap measures aimed only at solving particular problems.

Until the late 1800's property and casualty insurance rates were unreg-

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> Provided, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Recently, some observers have endorsed the idea of amending the McCarran Act to restrict state control of rates. *See, e.g.*, McHugh, *More Federal Relation and/or More Competition*, in INSURANCE, GOVERNMENT, AND SOCIAL POLICY 193 (S. Kimball & H. Denenberg eds. 1969). Nevertheless, federal regulation of rates does not appear imminent, and this analysis is based on the assumption that state jurisdiction of property and casualty rates will continue under the McCarran Act. The states have exercised almost exclusive control of this area for more than one hundred years. If for no other reasons, tradition and inertia preclude the federal government's usurpation of jurisdiction. Kimball, *The Case for State Regulation of Insurance*, in INSURANCE, GOVERNMENT, AND SOCIAL POLICY 411, 421 (S. Kimball & H. Denenberg eds. 1969). Furthermore, few insurers support federal regulation and certainly the states oppose the idea. Federal regulation of insurance has been debated for years, both in and out of Congress. *See* Rose, *supra* note 1, at 673. But there is little evidence that the federal government will enter the area of rate regulation of property and casualty insurance. Within the last decade state rate regulation has withstood severe criticism without federal intervention. S. REP. NO. 831, 87th Cong., 1st Sess. 111-29 (1961); S. REP. NO. 1834, 86th Cong., 2d Sess. 239-47 (1960). A corollary to federal regulation is the idea of the states abandoning rate regulation. Almost no one who has considered this alternative supports it. *See* WEST'S WISCONSIN LEGISLATIVE SERVICE, Preliminary Comment to Chapter 625, at 371-72 (1969); Williams, *Price Discrimination in Property and Liability Insurance*, in INSURANCE, GOVERNMENT, AND SOCIAL POLICY 209, 241 (S. Kimball & H. Denenberg eds. 1969); Strain, *Insurance Pricing and Its Role in Relation to Economic Theory and Marketing Management*, 33 J. RISK & INS. 447, 452 (1966).

7 1946 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 377. It has been said that "Regulation . . . is a living thing. It cannot be locked off into any permanent formula. It must change as the economic system in which it operates changes. The good, sound, practical regulation of one decade may not be necessarily the good, sound, practical regulation of another. . . ." Welch, *The Effectiveness of Commission Regulation of Public Utility Enterprise*, 49 GEO. L.J. 639, 672 (1961).

8 In 1969 several states enacted legislation to change existing modes of rate regulation. *See, e.g.*, CONN. GEN. STAT. ANN. § 38-201a-m (West Supp. 1970); ILL. ANN. STAT. ch. 73, §§ 1065.18-1 to -34 (Smith-Hurd Supp. 1970); MINN. STAT. ANN. §§ 70A.01-.22 (West. Supp. 1970); N.Y. INS. LAW §§ 175-80 (McKinney Supp. 1970); ORE. REV. STAT. §§ 987.205-.340 (1969); WIS. STAT. ANN. §§ 625.01-.35 (West Supp. 1969).

ulated. After the Chicago and Boston fires of 1871 and 1872, insurers set out to establish and maintain a system of uniform pricing to eliminate extensive rate fluctuations. Although a national scheme of concerted rate-making broke down by the 1880's, regional activities flourished.[9] In 1885, in response to intense antitrust sentiment,[10] legislation was enacted in Ohio prohibiting combinations to control fire insurance rates.[11] Acting under the belief that competition alone would keep rates as low as possible, the Ohio legislature endorsed competition in fire insurance ratemaking, both for companies and their agents.[12]

While Ohio was seeking to preclude rate-making combinations and to promote competition in fire insurance, it became apparent that legislative proscriptions were not being heeded. In a series of *quo warranto* actions during the 1890's,[13] testimony revealed that "advisory rates" were being promulgated, by which individual agents engaged in rate-fixing conspiracies.[14] Consequently, in the early 1900's a legislative committee was ap-

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[9] *See* S. KIMBALL, INSURANCE AND PUBLIC POLICY 94-97 (1960). While pricing agreements were developing in the insurance industry a parallel phenomenon was occurring in the industrial sector of the economy. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY 72-76, 308 (1955).

[10] The development of public concern about cooperative actions of competitors and governmental opposition to such actions is traced in H. THORELLI, *supra* note 9, at 54-164.

[11] 82 OHIO LAWS 231 (1885) as amended OHIO REV. CODE ANN. § 3927.05 (Page 1953) [hereinafter cited as CODE]. Ohio was the first state to enact an anticompact law. The statute applied only to rates charged for fire insurance by companies organized outside Ohio; domestic companies could combine to fix rates. Therefore, the anticompact legislation merely reflected a limited reaction against combinations to fix rates; localism prevailed to exempt domestic companies. The effort to prefer or give advantage to domestic companies over foreign ones was prevalent throughout the United States in the 1800's. The feeling was that foreign corporations were intruders and should be substantially restricted. S. KIMBALL, *supra* note 9, at 96-97, 270-88. Differential treatment between domestic and foreign companies continues today. *See* CODE §§ 6725.18, 5729.03 (concerning tax rates), 3927.06 (requiring deposits of stock or bonds by foreign companies).

[12] In recognition of the need for industry cooperation in inspecting risks the anticompact statute was amended in 1891. 88 OHIO LAWS 485-86 (1891). The amendment provided that companies were not prohibited from employing a common agent or agents to supervise and advise of defective structures, suggest improvements to lessen the fire hazard, and advise about the relative value of risks. The amendment was significant in that it became the original authority for establishing rating organizations or bureaus. C. YOUNGER, REPORT OF THE INVESTIGATION OF FIRE INSURANCE RATES IN OHIO 89 (1930). In 1900 the statute was amended again. 94 OHIO LAWS 103 (1900). This amendment prohibited combinations "for the purpose of governing or controlling the rates per centum or amount of commission or compensation to be allowed agents for procuring contracts for fire insurance on any property within the state."

The anticompact statute [CODE § 3927.05] has never been repealed in Ohio although its impact is virtually abrogated by CODE § 3935.17, which provides that compliance with sections 3935.01 to 3935.17 shall not constitute a violation of the anticompact statute.

[13] *See, e.g.,* State ex rel. Monnett v. Home Ins. Co., No. 5476, Record at 23 (Ohio Sup. Ct. 1897).

[14] "Advisory rates" reflected a scheme to evade the anticompact laws. The scheme was carried out through a "rater," who had no formal connection with any insurer, promulgating "advisory rates" which were sold to insurers. N.Y. Merritt Comm., Report, Assembly Doc. No. 30, 134th Sess. (1911), reprinted in *Insurance Industry Hearings before Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* pursuant to S. Res. 233, 86 Cong., 2nd Sess., pt. 5, at 2791, 2800 (1960) [hereinafter cited as *Insurance Industry Hearings*]. In addi-

pointed to investigate fire insurance rates. The inducement for the Ohio study probably came from the recommendation of a joint committee of the Senate and Assembly of New York, the Armstrong Committee, which concluded that unrestricted competition invited rate wars which in turn resulted in a dangerous lowering of the quality of protection afforded by insurers.[15] Further impetus for the study probably came from a report of the Committee on Fire Insurance Rates and Ratemaking to the National Convention of Insurance Commissioners. This report recognized the failure of "anti-compact laws" to bring about open competition.[16]

From its study, the Ohio legislative committee concluded that insurers were circumventing the Ohio law by various indirect means, including employment of a common agent to give "advice" concerning the relative values of risks. The committee found that price-fixing schemes were carried out through bureaus ostensibly formed to inspect insured structures.[17] These bureaus, which sold "advisory rates" to insurance companies, had no competition for services in their respective territories. Although the legislative committee admitted it could not find any evidence of express agreement between companies to charge uniform rates, it did find that all companies doing business in the state employed common agents or bureaus which fixed uniform rates and imposed sanctions on members departing from these rates.[18]

The reasons that insurers were not deterred by prohibitions against

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tion, under this scheme companies' rates were checked to determine whether the advisory rates were being followed. For an example of the checking process, *see* State ex rel. Crow v. Fireman's Fund Ins. Co., 152 Mo. 1, 35-36, 52 S.W. 595, 604 (1899).

Three cases represent efforts to apply Ohio's general antitrust statute [the Valentine Act], CODE §§ 1331.01-.99, to insurance pricing combinations. *Foster v. Ankenbauer*, 14 Ohio N.P. (n.s.) 637 (C.P. 1913); *State v. Bovee*, 6 Ohio N.P. (n.s.) 337 (C.P. 1907); *State ex rel. Taylor v. Ross*, 4 Ohio N.P. (n.s.) 377 (C.P. 1906). The issue of whether such combination violated the statute never reached the Supreme Court of Ohio, and the lower court decisions are contradictory.

15 Report of N.Y. Merritt Comm., *supra* note 14. In 1911, in response to the Committee's recommendations, legislation was enacted in New York permitting insurers of joint rate-making organizations and to adhere to rates established by them. Rates were required to be filed with the state superintendent of insurance who was empowered to supervise the activities of ratemaking organizations. G. HARTMAN, RATEMAKING FOR HOMEOWNERS INSURANCE 70 (1967).

16 1915 PROCEEDINGS, NATIONAL CONVENTION OF INSURANCE COMMISSIONERS 20. The Committee recommended legislation to regulate rate-making organizations and discriminatory rates. In addition, laws were urged which would make membership in, or cooperation with, rate bureaus compulsory. *Id.* at 19-21.

17 Report of Ohio Legislative Ins. Comm. to Hon. James M. Cox, Governor (1914). There were three Ohio bureaus: The Cleveland Inspection Bureau, which fixed rates for Cuyahoga County; the Cincinnati Fire Prevention Bureau, which fixed rates for Hamilton County; and the Ohio Inspection Bureau which fixed rates for the remainder of the state. *Id.*

18 *Id.* Subsequently, another investigation of fire insurance rates was undertaken by the Ohio Superintendent of Insurance in response to the Ohio Supreme Court's decision in Brand v. Safford, 118 Ohio St. 56, 160 N.E. 464 (1928). In *Brand*, the Court held that under provisions of the General Code, the Superintendent of Insurance had authority to investigate rate agreements among fire insurers or between fire insurers and rate bureaus and to issue an order approving or disapproving such agreements. The investigation led to a report containing the results of examination of the Ohio Inspection Bureau and a history of rate reductions. C. Younger, *supra* note 12.

cooperative rate making are fairly obvious: The insurers believed that joint action in rate making was essential to develop credible statistics because no single company had sufficient business to make its own experience a reliable guide for the future. Companies maintained that without credible data, they were subjected to price wars, which in turn drove rates down to uneconomical levels. The resultant prices went unnoticed until a catastrophe occurred that destroyed insurers and caused great losses to innocent policyholders. Faced with such a dilemma, which companies argued resulted from rampant competition, insurers established the practice of concerted rate making.[19]

In 1917, three years after completion of the Ohio legislative committee's study,[20] a bill was enacted that initiated Ohio's affirmative regulation of fire insurance rates.[21] This legislation required all fire insurers be members of rating bureaus, whose uniform rates were to be filed with the Superintendent of Insurance[22] if he so requested.[23] Price competition was limited to uniform deviations from bureau rates. This mandatory bureau scheme for fire insurance remained in effect until the 1940's.

As with the insurance regulation of other states, the Ohio scheme was predicated on the belief that insurance was not commerce and was

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19 C. Younger, *supra* note 12, at 2; Report of N.Y. Merritt Comm., *supra* note 14, at 2804-07; Rose, *supra* note 1, at 677-81; Kimball & Boyce, *The Adequacy of State Insurance Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 546-49 (1958).

20 The three year delay may, in part, be attributable to doubt about whether the state could exercise affirmative control over fire insurance rates. In 1914 the United States Supreme Court upheld the Kansas rate regulatory law, which proscribed excessive, inadequate, and discriminatory rates, reasoning that it served the public interest. The statute required rate filings to be made with the superintendent of insurance prior to the rates becoming effective. German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914). *See* Rose, *supra*, note 1, at 679.

21 107 OHIO LAWS 743-747 (1917). This mandatory bureau statute was repealed by the adoption of the all-industry laws for fire insurance in 1947. *See* text accompanying note 29 *infra*.

22 A separate insurance department was established in 1892. 69 OHIO LAWS 32 (1872). In 1921 the Ohio Department of Insurance was made a division of the Department of Commerce. 109 OHIO LAWS 105 (1921). In 1957 the agency was again made a separate Department of Insurance. CODE § 3901.01. When the agency was a division of the Department of Commerce, the person in charge was referred to as the "Superintendent of Insurance"; the head of the Department of Insurance is referred to as the "Director of Insurance."

23 The bill incorporated all but two committee recommendations—one that the anticompact laws be extended to cover agents, and another that the general antitrust laws be amended to cover fire insurance. The legislation provided (1) that every fire insurance company had to maintain or be a member of a rating bureau; (2) that every rating bureau engaged in making rates for fire insurance had to inspect every risk specifically rated by it, making a written survey to be filed in the bureau's office and furnished to property owners upon request; (3) that the Superintendent of Insurance could require the filing of rates and other information by the bureau and could examine any rating bureau as deemed expedient, but not less than once every three years; (4) that unfair discrimination between risks of essentially the same hazards and having substantially the same degree of fire protection was prohibited; (5) that deviations from bureau rates had to be uniform and could not be made without notice first being filed with the bureau and the Superintendent of Insurance; and (6) that no company or bureau could enter into any agreement which failed to comply with the legislation.

therefore not subject to federal control.[24] In 1944, however, the United States Supreme Court decided that activities of insurers conducted across state lines constituted interstate commerce and were therefore subject to federal regulation.[25] In response to this decision, the McCarran-Ferguson Act[26] was enacted in 1945, restoring to the states the power to regulate insurance. To ensure that state regulation would preempt federal jurisdiction pursuant to the McCarran Act, the all-industry bills[27] were drafted and offered to the states for adoption.[28] Rather than adopting the all-industry approach for both fire and casualty insurance rate regulation, Ohio chose a bifurcated system, with the all-industry approach for fire insurance[29] and file-and-use[30] for previously unregulated casualty insurance.[31] The tack taken by Ohio, though almost singular, was logical in view of its regulatory history. Because Ohio had a mandatory bureau[32] for fire insurance, adoption of the all-industry bill for that line represented a slightly liberalized continuation of the existing scheme. Similarly, the permissive file-and-use plan adopted for casualty insurance did not represent a radical departure from that line's previous freedom from regulation.[33]

Since adoption of the all-industry and file-and-use laws in 1947, rate regulation in Ohio has undergone little change. As in the past, existing Ohio rate regulatory legislation emphasizes the mechanics of rate-making and regulation. The statutes detail factors which insurers or bureaus must

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24 Rose, *supra* note 1, at 670-82.

25 United States v. South-Eastern Underwriters Ass'n 322 U.S. 533 (1944).

26 15 U.S.C. §§ 1011-15 (1964). *See* note 6 *supra* and accompanying text.

27 Under the all-industry laws, proposed rates must be filed with the state insurance commissioner prior to their use. Actual approval of rate filings is not required because rates are deemed approved by the commisioner if not disapproved within a given number of days. The all-industry laws are outlined in Rose, *supra* note 1, at 699-701. About 35 states have all-industry laws. *See* N.Y. INS. DEP'T, THE PUBLIC INTEREST NOW IN PROPERTY AND LIABILITY INSURANCE REGULATION 81 (1969).

28 *See* Rose, *supra* note 1, at 696-705.

29 *See* CODE ch. 3935.

30 Under file-and-use, rates and supporting materials must be filed for informational purposes with the appropriate state regulatory agency. Rates become effective upon filing or on a later date specified in the filing. About 10 states have file-and-use laws. *See* N.Y. INS. DEP'T, *supra* note 27, at 81.

31 *See* CODE ch. 3937.

32 Eleven states, including Ohio, regulated fire insurance rates through a mandatory bureau system. Marryott, *Mutual Insurance Under Rate Regulation*, 15 LAW & CONTEMP. PROB. 540, 543 (1950).

33 Prior to adoption of file-and-use, casualty insurance rates were unregulated. Purportedly, the absence of regulation was because competition was the rule rather than the exception for casualty insurance (particularly in the automobile lines). In addition, casualty insurance was a relatively insignificant form of coverage during the first half of the twentieth century. *See* E. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 268-69 (1927); Mertz, *The First Twenty Years—A Case-Law Commentary on Insurance Regulation Under the Commerce Clause*, 1963-64 PROCEEDINGS, ABA INSURANCE SECTION 151-61; Moser, *Operation of Independents Under the Rate Regulatory Pattern*, 15 LAW & CONTEMP. PROB. 523, 526-27 (1950).

consider in devising rates and provide for review of procedures by the Department of Insurance.

III. PROCEDURES GOVERNING RATE FILINGS

Under Ohio's existing regulatory legislation[34] rates must be based on consideration of "past and prospective loss experience within and outside this state;" "conflagration," "catastrophe," and other "physical hazards;" "a reasonable margin for underwriting profit and contingencies;" "dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to policyholders;" "past and prospective expenses both countrywide and those specially applicable to this state;" "the experience or judgment" of the filer;[35] and, "all other relevant factors within and outside this state."[36] Rates and supporting information must be filed with the insurance department,[37] but the statutes do not require actual departmental ap-

[34] Two chapters of the CODE deal with regulation of property and liability insurance rates. Chapter 3935 covers fire and inland marine insurance, CODE § 3935.02, and chapter 3937 covers casualty insurance, including all forms of motor vehicle insurance. *Id.* § 3937.02. If insurance, such as homeowners or commercial multiple peril, is subject to regulation under both Chapters 3935 and 3937, the filer may designate which chapter is applicable. *Id.* § 3935.02. The two chapters, being essentially alike in their provisions, may generally be discussed together.

Today, distinctions between fire insurance and casualty insurance are virtually nonexistent. Most companies do not limit their underwriting to one particular line. Additionally, the Ohio Insurance Department regulates both fire and casualty coverage in basically the same manner, notwithstanding the separate statutory provisions. A unified system of rate regulation is what in practice exists and there is no reason why legislation should not be enacted to consolidate the fire and casualty rate regulatory laws. *See* 1961 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 347.

[35] This requirement appears in section 3937.02(A) of the CODE, but not in section 3935.03(C). Section 3935.04(A), however, provides that "The information furnished in support of a filing *may* include the experience or judgment" of the filer. (Emphasis added.)

Perhaps the most significant factor enumerated in the statutes is "judgment." Judgment is involved in practically every step of ratemaking, including selecting the statistical information analyzed, assigning relative weights to the data assembled, and designing techniques to bring all components together. Additionally, judgment plays a fundamental role in rate-making when insurers determine classification plans and territorial boundaries, assess the competitive environment, or undertake innovations. Although rate-making may appear quite scientific, it is an interpretative art based on probabilities which are subject to various external chance factors such as storms and riots. Rate-making involves imperfect predictions, not assurances. C. KULP & J. HALL, CASUALTY INSURANCE 828-31 (4th ed. 1968). In A. MOWBRAY, R. BLANCHARD, & C. WILLIAMS, INSURANCE 416 (6th ed. 1969), the observation is made: "[J]udgment is always present, conditions are always changing, so that precisely accurate rates are a chimera." In view of the importance of judgment in insurance rate-making the Ohio insurance department's regulatory technique, discussed below, with its checks for computational errors, seems misplaced.

[36] CODE §§ 3935.03(C), 3937.02(A).

[37] CODE §§ 3935.04, 3937.03.

One type of insurer—the mutual protective association— is exempt from rate regulation in Ohio. CODE § 3935.02. Undoubtedly these associations are exempt because of their small size and informal character. Mutual protective associations generally operate at the township or county level, insuring against limited hazards such as fire, lightning, tornadoes, and windstorms. Each association is composed of 10 or more persons who insure one another, with the association being empowered to assess its members to pay losses. CODE § 3939.01. There are only about 75 mutual protective associations in Ohio; they write about $12 million in an annual premiums, or one percent of the total property and casualty insurance business. OHIO DIRECTOR OF INSURANCE, 104TH ANNUAL REPORT, 2-3 (1971).

proval of rates. A particular insurer may meet the filing requirement either directly by filing with the department,[38] or indirectly through the filing of a licensed rate bureau of which the insurer is a member or subscriber and whose rates the insurer adopts.[39] Moreover, insurers may deviate from bureau rates.[40]

A. *Rate Bureaus and Advisory Organizations*

Rate bureaus developed in the late 1800's.[41] Their primary purpose was and still is to assure that rates are derived from as broad a statistical base as possible and to assure rate reliability. However, rate bureaus do not confine themselves to gathering statistical data and making rates. Their functions may also include establishing underwriting rules, preparing and promulgating policy forms, and making rating and loss-prevention inspections.[42] An indication of their significant role in the insurance industry lies in the fact that bureaus spend millions of dollars annually for staff activities.[43] Because policy making committees are composed

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[38] CODE §§ 3935.04(A), 3937.03(A).

[39] *Id.* §§ 3935.04(B), 3937.03(B).

[40] Section 3935.07 of the CODE provides that a member or subscriber of a rate bureau may make written application to the insurance department for permission to deviate from bureau rates or rules. The application must specify the basis for the modification and a copy of the application must be sent to the bureau. Unless the bureau waives its rights, the department is required to set a time and place for a hearing at which the insurer and bureau may appear. Once the department permits a deviation for fire or inland marine insurance, it is in effect for one year unless, upon department approval, it is terminated sooner.

The extent to which this deviation procedure is used is one gauge for determining the extent of existing rate competition. In the 1950's, outside Ohio, some bureaus had a policy of challenging all deviation applications. The hearing procedure has been criticized as stifling competition and hindering independent action. *See* Rose, *supra* note 1, at 718-720. In the early 1960's the National Association of Insurance Commissioners and the United States Senate Judiciary Subcommittee on Antitrust and Monopoly recommended that rate bureaus be denied the right to challenge deviation filings. 1963 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 348, 351, 651-62, 654-66; 1962 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 502-05, 516; 1961 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 346-48; S. REP. NO. 831, 87th Cong., 1st Sess. 12-13, 122-23 (1961). At present, bureaus operating in Ohio waive their right to a hearing as a matter of practice. Ohio Department of Insurance response to a questionnaire of the Ohio Legislative Service Commission, *infra* note 55.

Under section 3937.06 of the CODE the deviation procedure for casualty insurance differs in several ways from that for fire and inland marine insurance under section 3935.07. Section 3937.06 provides that there may be deviations based on "a uniform percentage decrease or increase to be applied to the premiums produced by the rating system." By statute deviations for casualty insurance are effective immediately when filed with the department and remain in effect until withdrawn by the insurer or disapproved by the department. There is no real basis for the variations between CODE sections 3935.07 and 3937.06. The differences apparently exist because Ohio adopted the all-industry bill for fire insurance and a file-and-use bill for casualty insurance. *See* text accompanying notes 29-31 *supra.*

[41] *See* notes 9-18 *supra* and accompanying text.

[42] G. HARTMAN, *supra* 15, at 82.

[43] For example, one rating bureau's Statement of Income and Expenses for the Year Ending December 31, 1967, showed total expenses of almost $2,500,000. It had a staff of over 200. Rate bureau response to a questionnaire of the Ohio Legislative Service Commission, *infra* note 55.

largely of insurance company executives,[44] bureaus obviously afford significant opportunities for companies to engage in collusive, anticompetitive actions furthering the interests of insurers rather than those of insureds.[45] Yet the Ohio Department of Insurance appears relatively unconcerned about bureau practices, confining its attention almost exclusively to licensing bureaus.

Sections 3935.06 and 3937.05 of the Ohio Revised Code prescribe the method by which a rate bureau may obtain a license. The process is rather simple. The bureau must (1) file a copy of its constitution, rules, and membership and subscriber lists, (2) submit the name and address of its agent within the state who will be subject to service of process, and (3) provide a statement of the bureau's qualifications as a rate-making organization. The license must be renewed every three years. As a means of controlling bureau practices, the Code requires that the insurance department examine licensees at least once every five years. However, in spite of this statutory directive requiring periodic examinations, the department has apparently examined only two rate bureaus in the last five years.[46] The department may consider rate bureau examinations not worthwhile because the statutes fail to articulate the purposes and applicable criteria of the examinations. Statutory changes are needed to delineate and strengthen department control over rate bureaus.

Along with rate bureaus, advisory organizations have a pervasive influence over property and casualty rates. Sections 3935.12 and 3937.09 of the Ohio Revised Code define advisory organizations as "every group, association, or other organization of insurers . . . which assists insurers . . . in rate-making, by the collection and furnishing of loss or expense statistics or by the submission of recommendations, but which do not make filings" pursuant to other provisions of the rate regulatory statutes.

Apparently the Ohio Department of Insurance has never exercised its express statutory authority to examine advisory organizations and conduct hearings to determine whether those organizations have violated the law.[47] This is rather startling since, according to the Subcommittee on Antitrust and Monopoly of the United States Senate Committee on the Judiciary, advisory organizations exercise a profound influence over property and casualty rates, which would suggest that such organizations adversely affect rate competition. As noted by the Subcommittee:

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[44] G. HARTMAN, *supra* note 15, at 83.

[45] *See generally* S. REP. NO. 831, *supra* note 40, at 10, 21-66 (1961).

[46] The two bureaus—the Ohio Bureau of Casualty Insurers and the Western Actuarial Bureau (doing business as the Ohio Inspection Bureau)—were examined in 1968. In the last 20 years it appears that the Ohio insurance department has conducted six examinations—the two in 1968, one in 1960, and three in 1953. OHIO DIRECTOR OF INSURANCE, 94th ANNUAL REPOART vii, 14 (1961); OHIO DIRECTOR OF INSURANCE, 87th ANNUAL REPORT 13 (1954). The examinations in 1968 are not shown in the director's annual report.

[47] *See* CODE §§ 3935.12(C), 3937.09(C).

> It is manifest that State insurance departments have not been sufficiently aware of the scope of the activities engaged in by these advisory organizations. The failure of the States to take effective action or even be cognizant of the nationwide plan to retard the competitive process is a serious indictment of State regulation.[48]

Aside from the Senate Subcommittee's report, information concerning advisory organization is generally unavailable.[49] That which is available—material required to be filed with the state[50]—fails to provide any insight into the organizations' actual operations.

Existing legislation for rate bureaus and advisory organizations should be amended to bring them under stricter surveillance by the Ohio Department of Insurance. As a guide to such amendment, two different model laws may be considered. One law, proposed for the District of Columbia, represents an outgrowth of an investigation and report on insurance rates, rating organizations, and state regulation, conducted and prepared by the Subcommitte on Antitrust and Monopoly of the United States Senate's Committee on the Judiciary.[51] Under the D.C. bill, any organization seeking to exercise influence or control over the rate-making process would be required to maintain complete minutes of all board, committee, and subcommittee meetings, as well as membership meetings. In addition, rate bureaus and advisory organizations would be required to file considerable data with the state, including all recommendations submitted to insurers and others. Furthermore, the bill requires that each bureau or advisory organization be examined periodically and prohibits them from engaging in anti-competitive activities, including promulgation of rules or programs having the effect of requiring insurers to adhere to rates or preventing insurers from acting independently. In addition, it clothes the insurance department with authority to proceed against acts or practices deemed unfair, unreasonable, or having the effect of substantially lessening competition.

The other model law for controlling rate bureaus and advisory organizations has been adopted in Wisconsin.[52] The Wisconsin law is aimed at "rate service organizations," defined as any persons assisting insurers in rate-making or filing. The Wisconsin law details extensive powers by which the insurance department may examine rate service organizations at

48 S. REP. NO. 831, *supra* note 40, at 124.

49 *See* G. HARTMAN, *supra* note 15, at 157-62.

50 CODE sections 3935.12(D) and 3937.09(D) forbid insurers and rate bureaus from using information or adopting recommendations of an advisory organization that has failed to file with the department (1) a copy of its constitution and rules, (2) a membership list, (3) the name and address of an Ohio residence for service of process, and (4) an agreement that the department may examine the organization whenever expedient.

51 S. 568, § 9, 87th Cong., 1st Sess. (1961).

52 WIS. STAT. ANN. § 625.35 (West Supp. 1970). The Wisconsin insurance code is undergoing extensive revision. One of the purposes of the revision is to provide other states model legislation.

intervals established by departmental rule. Reports of these examinations are to be made available for public inspection. The demerit with respect to the Wisconsin law is that it seems to emphasize curbing deleterious activities through informal arrangements between the insurance department and rate service organizations and through publicity. This weakness in the Wisconsin law could be eliminated if various anti-competitive behavior by insurers and rates service organizations were expressly proscribed[53] and if the department or any person injured in his business or property were permitted to maintain an action to enjoin the proscribed conduct and to recover damages.[54]

B. *Approval of Rates*

Once filed with the Ohio Department of Insurance, rates become effective either immediately, or within a specified period of time. Under section 3935.04(D) of the Ohio Revised Code property rates become effective after being on file for fifteen days, and this period may be extended by the insurance department for another fifteen days. If not disapproved during the waiting period, the filings are deemed approved. Conversely, under section 3937.03(C) casualty rates may be effective immediately upon filing with the department.[55]

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[53] *See* note 51 *supra* and accompanying text. Agreements among insurers or rating organizations to adhere to any rate should be expressly proscribed. A ban on pricing agreements would reduce cartelization of the market by rate bureaus. Bureaus should be permitted to collect and pool statistical experience of insurers (an essential function of credible ratemaking), but each insurer should be free to set its own rates, thereby encouraging price variation.

There is little support for the position that rate bureaus should be abolished. They perform valuable functions by developing credible statistics and offering related services at a reasonable cost and by permitting an efficient use of scarce talents. *See* Williams, *Insurers Views on Property and Liability Insurance Rate Regulation*, 36 J. RISK & INS. 217, 233 (1969). *But see* Woodward & Fondiller, Inc., Report of Actuaries, Virginia Bureau of Insurance Case No. 17680, at 9-10 (1966).

[54] New York has recently adopted these measures. N.Y. INS. LAW §§ 177, 179 (McKinney Supp. 1970). *See also* CAL. INS. CODE § 1853.6 (West 1955) (prohibiting agreements to adhere to rates). The New York statute is discussed in Killen, *New York's New Rating Law Poses Unexpected Problems*, BEST'S REVIEW, Feb. 1970, at 10 (property-liability ed.).

[55] Although the statutes do not require nor provide for actual department approval of rates, seldom do insurers or bureaus implement rates without approval. In a questionnaire sent to 276 insurers and 13 rate bureaus operating in Ohio, most of the 65 insurers and 6 bureaus responding (representing 75 percent of the premium volume in Ohio for property and casualty insurance) indicated that they obtained advanced rate approval from the department. This questionnaire was distributed by the Ohio Legislative Service Commission in 1968 to all domestic property and casualty companies and all out-of-state companies writing more than $100,000 of direct premiums annually in Ohio for property and casualty coverage, as well as to all 13 rate bureaus licensed by the state. (A related questionnaire was submitted to the Ohio Department of Insurance by the Ohio Legislative Service Commission in 1968.) In seeking advanced approval, however, inordinate delays may result. One insurer reported "an isolated instance" of the department's not approving a filing for almost four years.

Both the all-industry and the file-and-use systems are aimed at precluding unnecessary delays in ratemaking and regulation, thereby allowing rates to be responsive to present circumstances. Additionally, they are designed to relieve the insurance department of the unduly burdensome task of reviewing all filings and the attendant pressures to withhold its imprimatur for an unpopular filing, by placing the burden of defending rates on insurers or bureaus.

Once rates become effective, the insurance department can suspend them after it has given notice,[56] conducted a hearing, and issued a valid order. To be binding, the order must specify in what respects the rates fail to comply with the applicable statutory provisions and the effective date of the order. The procedure is, however, rarely used and has not resulted in disapproval of an Ohio filing.[57] This is true in part because the department does not systematically review filings once they become effective. More importantly, the lack of department action to suspend rates may perhaps be attributed to the fact that rates are approved as they are submitted to the department prior to their being implemented.

C. *Basic Legislative Standards for Rates*

Ohio Revised Code sections 3935.03(B) and 3937.02(D) provide that property and casulty rates may not be "excessive, inadequate, or unfairly discriminatory." Although this proscription is the core provision of Ohio's rate regulatory legislation, the standards articulated are not defined in the Code. Indeed, there are few guidelines in Ohio's rate regulatory legislation which may be referred to in order to construe the words "excessive," "inadequate," and "unfairly discriminatory." After examining the legislation, one can conclude little more than that in Ohio the goals of rate regulation are reasonableness, adequacy, and equity,[58] terms that may be nothing more than expressions of generally perceived human aspirations concerning the insurance enterprise.

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56 Sections 3935.05(C) and 3937.04(A) of the CODE require 10 and 20 days' notice, respectively, prior to suspension of rates by the department.

57 Ohio Department of Insurance response to questionnaire of the Ohio Legislative Service Commission, *supra* note 55. The department simply does not have time to review old filings on its own initiative unless, upon a complaint, an error is revealed. Moreover, in an inflationary economy filings are revised rather frequently, significantly reducing the number of existing filings that could be reviewed.

58 Arguably, in an increasingly safety conscious society, encouragement of loss-preventive activities should be a major goal of rate regulation. However, substantial difficulties militate against focusing heavily on the loss-prevention objective for the mass market personal lines. Although inducement of loss-preventive practices among individual insureds is laudable, no one knows how successful such techniques as safe driver discounts are in deterring casualty-producing behavior, or how to improve the present system of incentives. *See* Mortimer, *Let's Hear From the Insurance Consumer*, 36 INS. COUNSEL J. 499, 503 (1969). From a practical standpoint it is doubtful that the reward or penalty offered individual insureds is enough to influence their conduct appreciably. Moreover, true cause and effect relationships between rate credits and loss-preventive factors are difficult in identify and measure, especially for private passenger automobile coverage. *See* TEMPLE UNIV. INS. DEP'T, A TOTAL APPROACH TO THE STUDY OF AUTOMOBILE ACCIDENTS 11-16 (1968). In fact, it has been alleged that credits are subject to abuse since companies may use them as a competitive weapon to discriminate unfairly in favor of preferred customers. R. MEHR & F. COMMACK, PRINCIPLES OF INSURANCE 795-96 (4th ed. 1966). Social policy, more than underwriting policy, makes reduction of economic and human losses an underlying objective of the insurance industry. Indirect financial gains, however, may accrue to insurers since such supposed loss-prevention schemes as safe driver and driver education discounts attract business. More efficacious means of reducing losses include strict traffic law and building code enforcement, better highway engineering, and large scale vehicle and building inspections. By reducing the number and size of claims, these direct means should ultimately have a greater impact on property and casualty rate levels than safety discounts. For

There appear to be two facets of the goal of rate reasonableness: one concerning the relationship of rates to insurer costs and reasonable profits, and the other concerning economic feasibility of rates in terms of what insureds can afford to pay. In deciding to permit concerted action through rate bureaus and advisory organizations under the umbrella of the McCarran-Ferguson Act, Ohio and most other states validated an activity through which, in the absence of public control, industry members may collusively fix prices and secure excessive rates. These excessive rates may be reflected not only in the magnitude of profits, but also in the size and nature of operating expenses passed on to the public through rates. A proscription against excessive rates is necessary to prevent exploitation of the public through concerted action. Recently, there has emerged a growing concern about the other aspect of reasonableness—economic feasibility of rates for mass market personal lines. The concern is based on the premise that insureds must be able to afford the price charged and feel that the insurance provided is worth the cost. The concept of economic feasibility rests on the idea that insurance of one form or another is such a vital ingredient for the effective functioning of the economy and the social system that no one should be denied it.[59] This idea may be gaining acceptance, as evidenced by the public outcry over automobile insurance costs. Ultimately, the concept of economic feasibility of insurance rates may achieve recognition by tax-supported, government-administered programs which provide subsidized protection for some insureds, by insurers charging a basic premium that everyone can afford—the costs in excess of the base premium being absorbed by the government through re-insurance or by direct subsidy payments to insurers, or by insurers being compelled to distribute broadly among their customers the special costs of certain classes of high risks.[60]

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a discussion of the view that insurance regulation of the mass market personal lines can foster loss control and prevention, *see* Denenberg, *Meeting the Insurance Crisis of Our Cities: An Industry in Revolution* 1970 INS. L.J. 205, 216-18. *See also* S. HUEBNER, K. BLACK & R. CLINE, PROPERTY AND LIABILITY INSURANCE 506-19 (1968).

Mandatory deductibles are another means of encouraging loss-preventive practices by individual insureds. Moreover, mandatory deductibles are justified on several other grounds. Without a deductible provision a portion of the premiums simply represents prepayment of future minor losses in the nature of maintenance expenses. Mandatory deductibles may improve the operating efficiency of insurers by reducing overhead costs of administration in processing small losses: costs which often exceed the amount of the claims. Also, they may reduce the inclination of insurers to cancel policies or to refuse to renew them because of poor experience resulting from small claims.

59 *See, e.g.*, PRESIDENT'S NAT'L ADVISORY PANEL ON INSURANCE IN RIOT-AFFECTED AREAS, MEETING THE INSURANCE CRISIS OF OUR CITIES 1 (1968); C. KULP & J. HALL, CASUALTY INSURANCE 418-23 (4th ed. 1968); In re Filing Made by N.C. Fire Ins. Rating Bureau, 165 S.E. 207, 219 (N.C. Sup. Ct. 1969).

60 Puerto Rico has adopted a "social protection plan" for automobile accident victims. The plan is administered, funded, and its solvency guaranteed by the government for a $35 fee paid by every person registering a motor vehicle. Aponte & Denenberg, *The Automobile Problem in Puerto Rico: Dimensions and Proposed Solution*, 1968 INS. L.J. 884 (1968); Aponte &

Adequacy reflects the fundamental purpose of insurance—to minimize losses of insureds who may encounter severe and unpredictable financial adversity.[61] Rates must be adequate not only to generate an insurance fund sufficient for paying legitimate claims and the related costs of handling them, but also to offset the drain on surplus resulting from an increasing number of policyholders, to provide for expanding contingency reserves, and to provide stock insurers a means to assure a return to investors.[62]

The legislative prescription for adequate rates was primarily influenced by the large number of insurance company failures in the 1800's.[63] Recently, however, the thesis has been developed and documented that rate levels have had little to do with insurer insolvencies.[64] Admittedly with respect to any insurer, total premiums and investment income must be sufficient to sustain the enterprise; insolvency is inevitable if in the long run premiums plus investment income do not equal or exceed claims plus expenses. But today no company seeks to employ patently inadequate rates. Consequently, state insurance commissioners rarely order insurers to increase rates to avert insolvencies.[65]

Equitable rates may be considered from the standpoint of economic and social considerations. From an economic standpoint, rates must be fixed

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Denenberg, *The Social Protection Plan*, BEST'S INS. NEWS, Sept. 1968, at 40 (property-liability ed.).

Under the Housing and Urban Development Act of 1970 the secretary of HUD is authorized to offer crime insurance at "affordable rates" if he finds "a critical market unavailability situation." Pub. L. No. 91-609, §§ 601-604 (Dec. 31, 1970).

61 S. HUEBNER, K. BLACK & R. CLINE, *supra* note 58, at 6-7.

62 *See* ARTHUR D. LITTLE, INC., PRICES AND PROFITS IN THE PROPERTY AND LIABILITY INSURANCE INDUSTRY 23-40 (1968); Crowe, *Evaluating Rate Making Systems*, 17 ANNALS, SOCIETY OF CHARTERED PROPERTY & CASUALTY UNDERWRITERS 213, 215-18 (1964).

63 In the 1800's, when the insurance industry was free of government rate regulation, more than 3,000 fire insurers failed. These failures were allegedly due to "the frequently excessive competition" that "forced premiums down to uneconomic levels and ultimately drove companies out of existence." S. KIMBALL, INSURANCE AND PUBLIC POLICY 94 (1960).

64 Insolvencies are attributable to three basic causes, none of which are controllable by rate regulation because they are unrelated to prices: (1) fortuitous events such as catastrophic losses and economic depressions; (2) inept management as manifested through marketing errors, lax underwriting standards, and imprudent investments; and (3) venal management engaged in various "milking" schemes. N.Y. INS. DEP'T, THE PUBLIC INTEREST NOW IN PROPERTY AND LIABILITY INSURANCE REGULATION 56 (1969). A former Michigan commissioner of insurance has stated succinctly: "Neither rate regulation nor any other governmental requirement can ensure adequate rates. Only competent company management and better statistical and actuarial techniques than have, in general, been used by property insurers, can do that." Mayerson, *Some Considerations in Regulation of Rates*, INSURANCE, Dec. 23, 1967, at 15, 19. See also ARTHUR D. LITTLE, INC., *supra* note 62, at 8, 56-57; Kaplan, *Regulation for Insolvency*, 3 FORUM 168 (1968); BENNETT, *Liquidations of Insurance Companies*, in INSURANCE AND GOVERNMENT 197 (C. Center & R. Heins eds. 1962); Mertz, *Discussion of Rate Regulation Revisited*, in INSURANCE AND GOVERNMENT 418, 423-25 (C. Center & R. Heins eds. 1962); Morrill, *Discussion on the Economics and Principles of Insurance Supervision*, in INSURANCE AND GOVERNMENT 87, 89-90 (C. Center & R. Heins eds. 1962).

65 Mayerson, *Ensuring the Solvency of Property and Liability Insurance Companies*, in INSURANCE, GOVERNMENT AND SOCIAL POLICY 146 (S. Kimball & H. Denenberg eds. 1969).

in such a way that a policyholder or each homogeneous group of policyholders pays his or their proportionate share of the insurer's losses and expenses. Economic equity is justified because it results in efficient allocation of resources among competing uses, a guiding tenet of any economic system.[66] From a social standpoint, equity suggests that individuals should not be required to pay higher rates than others owing to factors over which they have little or no control, such as race,[67] geographical location,[68] or involvement in a casualty for which the insured was not at fault.[69] Social equity stresses equality, which in this context may be achieved only by deemphasizing or even ignoring loss and expense costs attributable to an individual policyholder or a group of policyholders who has willfully done nothing to increase the risk.[70] To achieve economic fairness by employing actuarial techniques, one should refine his data as much as possible, and the smaller the classes or groups the greater the possibility that distinctions will arise which reflect social inequities and that rates will reinforce inequities.

One difficulty in attempting to achieve social equity through insurance rates is that rates are a rather indirect means of attacking the problem. Even if state regulation of property and casualty insurance rates were designed so that all insureds found premiums to be within their means, the effect upon social justice would be negligible.[71] In addition, those

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[66] *See* Williams, *Price Discrimination in Property and Liability Insurance*, in INSURANCE, GOVERNMENT AND SOCIAL POLICY 209, 217 (S. Kimball & H. Denenberg eds. 1969).

[67] Although CODE sections 3911.16-.19 prohibit life insurance companies or their representatives from discriminating among insureds on the basis of race by charging different rates, there is no such express proscription for property and casualty insurance. The portions of the CODE, §§ 3935.03(B) and 3937.02(D), pertaining to property and casualty insurance, merely provide: "Rates shall not be . . . unfairly discriminatory." However, in 1965, the Ohio Director of Insurance issued a bulletin indicating that these sections prohibit discrimination on the basis of race. OHIO DEPARTMENT OF INSURANCE, BULLETIN NO. 45 (May 14, 1965).

[68] OHIO DEPARTMENT OF INSURANCE, BULLETIN NO. 45 (May 14, 1965) provides: "If a company establishes that a certain hazard is present in all risks located in a given area, this factor may be taken into account in making underwriting decisions concerning those risks. On the other hand, general characteristics such as type of neighborhood may not be used indiscriminately as applied to all risks located in the given area."

[69] For private passenger automobile insurance, because careless driving is frequently hard to distinguish from usual practice, inferior risks may be difficult to identify with any satisfactory degree of accuracy solely on the basis of prior involvement in accidents. This assertion is buttressed by estimates that one collision occurs for every 61,000 miles a car is driven, one near-collision every 500 miles, and one driving error every two miles. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 16 (1965).

[70] For the view that economic equity should be deemphasized to achieve social equity, see C. KULP & J. HALL, *supra* note 59, at 475-77.

[71] Any estimate would depend on the extent to which the state regulatory system sought to adjust rates to achieve social justice. No one has detailed the extent to which rates should be so adjusted. Premium costs for private passenger automobile coverage give some idea of any adjustment. The average annual premium for a fairly standard policy for automobile protection in Ohio is probably about $150. See H.R. REP. NO. 815, 90th Cong., 1st Sess. 51 (1967). Downward rate adjustments of about 50 percent, which would seem highly unlikely under any modified regulatory pattern, would result in a premium cut of $75.

benefited would generally be only those with property to insure. Certainly welfare programs offer a more direct means of achieving social justice or equity than do insurance rates.[72] Absent support for a social insurance system for property and casualty coverage, there is no more reason why some insureds should be charged higher rates to subsidize the less affluent than there is for varying the price of automobiles, replacement tires, gasoline, oil, or parking fees to achieve social justice, and apparently there is little public interest for such reform on a large scale.

In defining "excessive" the Ohio Department of Insurance on one occasion endorsed the California approach.[73] Under California's standards, whether rates are excessive is determined by examining the existing degree of competition or by comparing rates being charged for similar coverage. In practice, however, the department's approach has not rested on an application of California standards but rather on the level of underwriting profits. Under this approach, if it is determined by use of a formula[74] that a rate has provided or will provide an underwriting return or a profit above a certain target level, the rate is characterized as excessive. Application of this formula approach and the lack of concern for establishing its validity are illustrated by the Ohio department's handling of a filing by the Allstate Insurance Company.

In 1967 Allstate made a filing with the Ohio Department of Insurance

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[72] For a discussion of the use of insurance premiums to redistribute income, see Blanchard, *Government Regulation of Business*, J. AM. INS., May 1945, at 16.

[73] See CAL. INS. CODE § 1852(w) (West 1955). The Ohio department's recognition of the California definition is evidenced by the following statement: "No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance coverage provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." Ohio Department of Insurance response to a questionnaire by the Ohio Legislative Service Commission, *supra* note 55. (This statement is a direct quote from § 1852 of the CALIFORNIA INSURANCE CODE.)

In 1969 the department indicated that excessive rates were of little concern since competition would keep rates down, the fundamental problem being whether rates were inadequate as to cause insolvencies. Ohio Department of Insurance response to a questionnaire by the Legislative Service Commission, *supra* note 55.

Of the insurers and rate bureaus responding to a 1968 questionnaire, *supra* note 55, none thought that the department was following the California definitions. The questionnaire asked, "In your opinion, what factors does the Ohio Insurance Department consider in determining whether a rate is excessive, inadequate, or unfairly discriminatory?" Almost all insurers stated that they did not know. These responses may be all too accurate, for as one commentator has remarked, "There probably are as many interpretations of the rate standards as there are members of the industry." F. CRANE, AUTOMOBILE INSURANCE RATE REGULATION 103 (1962).

[74] On its face the provision that "rates shall not be excessive, inadequate, or unfairly discriminatory" appears to establish a "zone of reasonableness," between the maxima and minima within which a carrier is free to fix its charges. *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935). However, in processing rate filings the Ohio Department of Insurance uses formulae to determine whether the statutory standards are satisfied. The formulae identify loss, expense, and profit components of rates and prescribe what percentage of each rate is allocable to the components. The Ohio department formulae allow five percent of casualty rates for profits and contingencies and six percent of fire rates for profits and catastrophes. The formula applied to fire rates was devised in 1921. 1922 PROCEEDINGS, NATIONAL CONVENTION OF INSURANCE COMMISSIONERS 19. *See generally* Jeffery, *Standard Profit Formula*, 19 ANNALS, SOCIETY OF CASUALTY & PROPERTY UNDERWRITERS 307 (1966).

for automobile liability and collision coverage. The department challenged the filing on the ground that the new rates were excessive since Allstate had made almost a seven percent underwriting profit on its automobile liability and collision coverage the previous year. Because such underwriting profit exceeded the five percent target level under the department's formula, Allstate's rate increase was deemed excessive. Allstate's new rates, however, were ten to fifteen percent below those of other companies writing a significant portion of Ohio's auto business. The department notified Allstate that a hearing would be held to determine whether its rates complied with the statutory standards as interpreted by the department, but the hearing was postponed. In late 1968 the department reportedly informed Allstate that its challenge would not be pursued.[75]

The standard of "inadequacy" has also been a subject of confusion. The Ohio Department of Insurance has indicated that its concern with the standard of inadequacy is whether given rates tend to endanger company solvency or eliminate competition.[76] Nevertheless, as with the standard of excessiveness, the department has focused on the level of underwriting profits to evaluate adequacy of rates. Several years ago, when examining the rates of a company whose overall financial condition was critically unsound, the department reportedly took the position that the insurer's rates were inadequate because they did not generate the underwriting profits called for under the department's rate formulae. Whether the department would regard as inadequate a rate which may produce an underwriting profit below that proscribed by the department's rate formula for a financially sound insurer is unknown; apparently the issue has never arisen.

There are, of course, practical limits to what the department can do to combat rate inadequacy. The department has no authority to fix adequate rates; it can only determine whether specific rates meet statutory requirements. If the department were to disapprove rates as being too low, the public would believe that the department is insensitive to consumer interests, and insurers would allege that the department unduly interfers

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[75] Citizen-Journal (Columbus, Ohio), Aug. 3, 1968, at 13, col. 1. *See* Insurance Industry Hearings, *supra* note 14, pt. 14, at 8721.

In late 1966 the Kentucky insurance department (apparently applying standards similar to those applied by the Ohio department) determined that Allstate's proposed rates were excessive. Rate Adjustment of Allstate Ins. Co., Order of Ky. Comm'n of Ins. 4 (Nov. 9, 1966).

For an attack on interpreting "excessive" in terms of an individual company's profit level, see Moser, *Operation of Independents under the Rate Regulatory Pattern*, 15 LAW & CONTEMP. PROB. 523, 529-35 (1950).

[76] In defining "inadequate" rates the Ohio department again used the language of the California Code. *See* CAL. INS. CODE § 1852(a) (West 1955). The language of the department, which is essentially that found in section 1852 of the California Code, reads: "No rate shall be held to be inadequate unless such rate is unreasonably low for the insurance coverage provided and is insufficient to sustain projected losses and expenses; or unless such rate is unreasonably low for the insurance coverage provided and the use of such rate has, or if continued, will have, the effect of destroying competition or creating a monopoly." Ohio Department of Insurance response to a questionnaire of the Ohio Legislative Service Commssion, *supra* note 55.

with managment prerogatives. Also, there is the danger that companies would be priced out of the market if the department refused to allow coverage to be written at rates below certain levels. For these reasons the Ohio department focuses little attention on the adequacy of rates, relying on the belief that out of economic self-interest insurers will not employ inadequate rates.[77]

Absent express statutory definitions for "excessive" and "inadequate," the difficulty encountered in construing these terms has led commentators, state officials outside Ohio, and insurers to conclude that the statutory tests to determine whether rates are inadequate or excessive should be more specific.[78] The tests proposed are similar to those applicable in California for over two decades, and which the Ohio Department of Insurance referred to on one occasion.[79] The California rate law provides:

> No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance provided and (2) a reasonable degree of competition does not exist in the area with respect to the classification to which the rate is applicable.
>
> No rate shall be held to be inadequate unless (1) such rate is unreasonably low for the insurance provided and (2) the continued use of such rate endangers the solvency of the insurer using the same, or (3) such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly.[80]

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[77] Insurers writing coverage in Ohio and elsewhere agree that state insurance regulators regard "excessive" as a more important standard than "inadequate." 1967 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 400.

[78] F. CRANE, *supra* note 73, at 110. Former Ohio Superintendent of Insurance Vorys has admitted: "I defy any casualty actuary . . . to predict with certainty what any given commissioner will do with any rate filing made pursuant to our rating laws. The lack of definite standards against which a rate may be approved or disapproved is or should be of real concern." Vorys, *The Responsibilities of the Insurance Commissioner*, in 1957 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (1971).

Virtually no one believes that the existing standards of excessiveness, inadequacy, and unfair discrimination should be eliminated from the rate regulatory laws. *See* 1967 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 447-49, 471-86; Williams, *Insurer Views on Property and Liability Insurance Rate Regulation*, 36 J. RISK & INS. 217, 230-31 (1969).

[79] Note 73 *supra* & accompanying text. In response to a question about the definitons of "excessive, inadequate, and unfairly discriminatory," almost all insurers who answered the question and who operate in Ohio indicated that they preferred the California approach. In 1969, the National Association of Insurance Commissioners concluded that ". . . where appropriate, reliance be placed upon fair and open competition to produce and maintain reasonable and competitive prices for insurance coverages. . . ." 1969 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 310.

[80] CAL. INS. CODE § 1852(a) (West 1955). Recently, several states have adopted the California definitions. *See, e.g.*, IND. ANN. STAT. § 39-5241(4) (Burns Supp. 1970); GA. CODE ANN. § 56-507(a) (Supp. 1970).

In Minnesota and Wisconsin excessiveness and inadequacy are defined somewhat differently: "Rates are presumed not to be excessive if a reasonable degree of price competition exists. . . ." "If such competition does not exist, rates are excessive if they are likely to produce a long-run profit that is unreasonably high in relation to the riskiness of the class of business, or if expenses are unreasonably high in relation to the services rendered." Rates are inadequate if they

In a model bill drafted for the District of Columbia, the definition of "excessive" is identical to California's.[81] The definition of "inadequate," however, differs in that it is based on a determination of underwriting loss rather than competition or solvency. "Inadequate" as used in the D. C. bill is defined as follows: "No rate shall be held to be inadequate which upon reasonable assumptions of prospective loss and expense experience will not produce an underwriting loss."[82] As a guide to "reasonable assumptions of prospective loss and expense experience," the D.C. bill enumerates various factors for consideration, such as past loss and expense experience in addition to catastrophe and conflagration hazards.

In the California and District of Columbia legislation use of competition as the basic standard for determining excessive rates allows the insurance department to rely upon the economic forces of the market place to ensure that rates will be reasonable. So long as competitive conditions exist, detailed scrutiny of rate filings to detect excessive rates may be largely dispensed with. However, in determining whether a reasonable degree of competition exists, the Ohio Department of Insurance would have to consider competitive factors on which it does not now focus, such as the number of effective sellers, the relative freedom of entry of firms into the market, the independence of rivals, the extent of predatory and preclusive practices, the rate of industry growth, the character of market incentives to competitive moves, the degree of product differentiation and homogeneity, the extent of price competition, the presence or absence of excess capacity, and the nature of price discrimination.[83] Although consideration of such factors would place a new burden on the department, the need for a more explicit definition of "excessive" is paramount, and indications are that sufficient competition exists in Ohio to assure that the California definition is workable.[84]

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endanger the solidity of the insurer that uses them or if they are insufficient to sustain projected losses and expenses. MINN. STAT. ANN. § 70A.04 (West Supp. 1970); WIS. STAT. ANN. § 625.11 (West Supp. 1970).

[81] S. 568, § 3, 87th Cong., 1st Sess. (1961).

[82] *Id.*

[83] The elements for determining competitive behavior were set forth in the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 324-37 (1954). In the context of insurance rate regulation, they are developed in F. CRANE, *supra* note 73, at 110-121.

[84] More than 500 fire and casualty insurers operate in Ohio; approximately 140 property and casualty companies have their home offices there. This number is exceeded by only six other states. OHIO DIRECTOR OF INSURANCE, 104TH ANNUAL REPORT 1 (1971); INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS 1970, at 8 (1970).

The Ohio market structure does not appear unduly concentrated in favor of any particular company. In terms of premium volume, the 10 leading property and casualty companies in Ohio write about 40 percent of the total business, and the leading 20 companies write about 55 percent. OHIO DIRECTOR OF INSURANCE, 104TH ANNUAL REPORT 22-45 (1971). Premium volume is the most meaningful measure of concentration in the insurance industry. F. CRANE, *supra* note 73, at 36; R. HENSLEY, COMPETITION, REGULATION AND THE PUBLIC INTEREST IN NONLIFE INSURANCE 28 (1963). Formation of property and casualty insurance companies under Ohio's law and admission of out-of-state insurers appear relatively easy. In the

With respect to a definition for "inadequacy," the District of Columbia definition, based on a determination of underwriting loss, has the merit of being more concise and objective than California's definition which focuses on unfair pricing and company solvency. The D.C. bill also reflects the view, supported by empirical evidence, that solvency of carriers is not closely related to rates.[85] However, underwriting loss relates only to a comparison of claim losses and operating expenses with premiums and does not take account of insurers' investment income. Since the California definition is not limited to the underwriting facet of the property and casualty enterprise,[86] it is more comprehensive. Regardless of which is the better definition, Ohio needs definitive legislative definitions for

last decade 15 Ohio companies were licensed to do business in the state. This compares more favorably with other states such as New York, where during the last decade 21 property and liability companies were formed and 47 foreign and alien companies were admitted to do business. NEW YORK INS. DEP'T, *supra* note 64, at 87. However, from an examination of the annual reports of the Ohio Director of Insurance, it appears that during the last twenty years no property and casualty company has been liquidated and only eleven have had their policies reinsured. This suggests that competition may have been moderated to achieve a level of rates high enough to preserve inefficient, high cost insurers.

Deviation and independent rate findings are extensive. Although it is difficult to determine and categorize the premium volume written under independent (non-bureau) and deviation rate filings, it seems to be between 30 and 60 percent of Ohio's premium volume for property and casualty insurance. A study of filing practices of insurers operating in Ohio shows that, depending on the type of insurer and the type of coverage, between 27 and 56 percent of those companies writting fire insurance use deviated rates, with only a few using independently filed rates; between 18 and 50 percent of those companies writing homeowners insurance use deviated rates, with 10 to 26 percent filing independently; and between 17 and 38 percent of those companies writing automobile related insurance use deviated rates, with 39 to 53 percent filing independently. Ohio Leg. Serv. Comm. Rate Regulation in Ohio (Dec. 13, 1968 unpublished memorandum). According to one insurer, in 1967 five companies, making independent filings, wrote more than 30 percent of the automobile insurance business in Ohio. *See* note 55 *supra*. Of 8,321 filings received by the Ohio Department of Insurance in 1967, 812 were deviations and 5,054 were independent filings.

Two minor impediments to vigorous competition exist. First, reciprocal insurers are prohibited from writing property damage and bodily injury coverage for private passenger automobiles principally used for nonbusiness purposes. CODE § 3931.01. Because of this restriction the reciprocals operating in Ohio write only about $3.8 million of annual premiums. OHIO DIRECTOR OF INSURANCE, 104TH ANNUAL REPORT 2-3 (1971). Section 3931.01 represents an effort to protect local stock and mutual insurers from competition by out-of-state reciprocals. This provincial restriction should be eliminated. Second, group property and casualty coverage is prohibited. The absence of enabling statutes authorizing the writing of group fire, casualty, inland marine, and surety insurance has led the Ohio Department of Insurance to take the position that group property and casualty insurance is illegal. Field, *Employee Group Property and Liability Insurance—Revisited*, BEST'S REVIEW, Sept. 1971, at 10, z (property liability ed.); OHIO INSURANCE DEPARTMENT, BULLETIN NO. 18 (April 9, 1958). Group property and casualty insurance lowers the cost of coverage to insureds by 15 to 20 percent and results in greater availability of coverage through less stringent underwriting standards. Coffey, *Mass Merchandising*, BEST'S REVIEW, June 1968, at 100 (property-liability ed.). *See generally Insurance Industry Hearings*, pt. 14, at 8320-32 (1968); CHASTIN, *Group Property and Liability Insurance*, in R. EILERS & R. CROWEE, GROUP INSURANCE HANDBOOK 732 (1965); Webb, *Collective Merchandising of Automobile Insurance*, 36 J. RISK & INS. 465 (1969). Resistance to group property and casualty insurance comes from agents who fear loss or shrinkage of commissions. *See* Wall St. J., July 30, 1969, at 3, col. 4 (midwest ed.); Wall St. J., Nov. 30, 1967, at 1, col. 6 midwest ed.); OHIO ASSOCIATION OF INSURANCE AGENTS, AGENCY BULLETIN, Sept. 20, 1967.

[85] *See* notes 63-65 *supra* and accompanying text.

[86] *Contra*, F. CRANE, *supra* note 73, at 127-31.

"excessive" and "inadequate," whether that legistlation be an adoption of California's, the District of Columbia's, or a combination of both.

Unlike the standards of "excessive" and "inadequate," the "unfairly discriminatory" proscription, although not defined in the statutes, has precipitated few major interpretative problems. There is general unanimity that the proscription means that subject to practical limitations, rates for various classes must be proportional to expected claims or losses and expenses attributable to each class of insurance.[87] In providing that rates shall reflect the loss and expense experience, sections 3935.03(C) and 3937.02(A) of the Ohio Revised Code indicate that this is the appropriate interpretation. The term "unfair discrimination" is the focus of attention in only two or three cases each year throughout the United States.[88] One explanation for this is that evidence of discrimination rarely appears on the face of a rate filing reviewed by state insurance departments. Unfair discrimination, if it occurs at all, does not arise from the rate itself, but from its application.

D. *Administrative Practice*

The deficiencies of Ohio's rate regulation are not confined to its existing statutory provisions. Administrative infirmities exist which impede vigorous, effective regulation of property and casualty insurance rates. For example, the department's small rating section of seven individuals[89] assumes a staggering task which revolves around combing through rate filings submitted by insurers and bureaus in an effort to detect errors. For example, in 1967 the section processed about 8,700 filings.[90]

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[87] *See* WILLIAMS, *Price Discrimination in Property and Liability Insurance*, in INSURANCE, GOVERNMENT AND SOCIAL POLICY 209, 211-12 (S. Kimball & H. Denenberg eds. 1969); C. WILLIAMS, PRICE DISCRIMINATION IN PROPERTY AND LIABILITY INSURANCE 7, 79-83 (1959).

A type of unfair discrimination is personal discrimination effected through rebates. Section 3933.01 of the CODE proscribes such unfair personal discrimination. By implication sections 3935.09 and 3937.08 proscribe misclassifications. *See* notes 104-106 *infra* & accompanying text.

[88] *See* C. WILLIAMS, *supra* note 87, at 79.

[89] Approximately 90 individuals work in the department. OHIO INS. INDUS. COMM., STATE INSURANCE DEPARTMENT STATISTICAL DATA, year ending December 31, 1969, at 1 (undated).

In sharp contrast to Ohio, New York's rating staff consists of 28 individuals, only four of whom are clerical. Franson, *The Prior-Approval System of Property and Liability Insurance Rate Regulation: A Case Study*, 1969 WIS. L. REV. 1104, 1109.

[90] Response to questionnaire of the Ohio Legislative Service Commission, *supra* note 55. This amount includes both rate and form filings. Form filings may involve such inconsequential matters as changing the name of an insurer's officer on its policies. Form filings are handled by the rating section since policy changes may be tantamount to rate changes. The department estimates that up to 80 percent of all filings involve forms, leaving it with about 1,700 annual rate filings. *Id.* This estimate of the number of rate filings seems accurate when compared with figures from other states. The New York Insurance Department processes about 1,500 rate filings a year. Franson, *supra* note 89, at 1115. The Non-Life Division of the Kentucky Insurance Department reviews approximately 1,200 rate filings annually. R. Franson & G. Hartman, *A Study of the Administration of Kentucky Ratng Laws*, KY. LEGIS. RESEARCH COMM'N REP. NO. 46, at 23 (1967).

The rating section reports that in processing each rate filing it verifies the adequacy of the filer's license authority; determines the kind or class of coverage involved, including whether the coverage is new or a revision of existing coverage and whether the filing is properly a deviation or an independent filing; ascertains the nature and extent of departure from present coverage; reviews comparable or analogous filings; analyzes the proposed rating and classification system and reconciles it with the coverage contemplated; establishes the statistical plan's ability to produce data justifying the classification system; determines the propriety of the proposed rate formulae; checks mathematical computations; analyzes, compares, and evaluates judgment, trend, and projection factors; analyzes relevant loss experience and expense factors; verifies the accuracy and appropriateness of data in the filing by comparison with the insurer's annual statement, expense exhibits, and reports of statistical agencies; evaluates the statements of bureaus affected by deviations[91] and the waivers of their right to hearings; if necessary, obtains additional information from the filer; and, finally, notifies the filer of the final disposition of the matter.[92] How all the steps are followed is difficult to understand,[93] especially since a filing may be 50 or more pages long and may contain hundreds of computations, with literally thousands of bits of information.[94] Certainly this work leaves little time for anything else.[95]

In 1967 the department "disapproved" 28 rate filings, less than two percent of the total number filed. This small number may be deceptive since prior to making a formal filing insurers or bureaus often informally present proposals to the department and learn that they are unacceptable. Moreover, disapproval may be avoided by modifications being made at the department's suggestion. Information concerning why filings are disapproved is not available. The department says that "disapprovals" occur because the rates proposed would be excessive, inadequate, or unfairly discriminatory and that this is what the filer is told. Response to questionnaire of the Ohio Legislative Service Commission, *supra* note 55.

Unless the department has modified its definition of a filing or has changed its tabulation techniques, the number of filings has dropped by one-third in a decade. During 1956 the department handled more than 12,000 filings. OHIO DIRECTOR OF INSURANCE, 90TH ANNUAL REPORT viii (1957).

91 The Ohio department received over 800 deviation filings in 1967. Response to questionnaire of the Ohio Legislative Service Commission, *supra* note 55. For a discussion of deviation filings *see* note 40 *supra*.

92 Response to questionnaire distributed by the Ohio Legislative Service Commission; OHIO INSURANCE DEPARTMENT; BULLETIN NO. 16 (Jan. 17, 1958).

93 The time required to process rate filings is suggested in Franson, *supra* note 89, at 1119-21; R. Franson & G. Hartman, *supra* note 90, at 10-13. No such data is available for Ohio. Apparently, work load and production information is not maintained.

94 *See, e.g.*, filing of State Farm Mutual Insurance Company, dated May 15, 1967, involving certain forms of automobile insurance for Ohio.

95 The attention focused on minutiae in regulating property and casualty rates is not unique to Ohio. The New York Insurance Department has admitted:

> Left alone with each other, the regulator and his industry unconsciously find a mutual interest in ritualizing their relationship. The regulator must emphasize law and regularity, against the day he is challenged in court or denounced in public. He thus must look to form and detail, and may look away from the operating realities of the industry and from the expectations of the public. The industry relies on the rituals of

The rating section needs to extricate itself from the quagmire of detail in which it is immersed. To routinely and unselectively review and analyze masses of technical data is, as one commentator has said, "like enforcing traffic regulations by placing a police officer at each and every intersection and stop sign."[96] The existing pattern of regulation forces the department to divert manpower that might otherwise effectively monitor the actual operation of the property and casualty industry. Although nothing in the Ohio statutes requires detailed review of each rate filing, the practice has become so established in the Ohio Department of Insurance that probably the only way to discontinue it is to eliminate the filing requirement.

Under a no-file system—a type of system which in recent years has gained a number of supporters[97]—insurers and rate bureaus may devise rates and put them into effect immediately. However, they must maintain records concerning their rates, underwriting rules, and experience or other information employed in making rates. The thrust of regulation under the no-file system is on examinations of insurer and bureau rate-making procedures and on the application of rates to insureds.[98] The examinations are conducted at insurer or bureau offices, supplemented by special investigations of complaints and inquiries directed to the insurance department.[99]

There are other potential advantages of a no-file system that give weight to the idea of Ohio's adopting it. A no-file system may eliminate procedural deterrents and delays in implementing rate changes, thereby promoting competition and at the same time discouraging insurers from

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regulation to make government behavior predictable and to keep the regulator occupied where interference can be tolerated. . . .

. . . .For the competent regulator the snare is not error; it is irrelevance.

N.Y. INS. DEP'T, THE PUBLIC INTEREST NOW IN PROPERTY AND LIABILITY INSURANCE REGULATION 11-12 (1969).

96 Franson, *supra* note 89, at 1124.

97 Insurers operating in Ohio have warmly endorsed the no-file system. *See* Williams, *Insurer Views on Property and Liability Insurance Rate Regulation*, 36 J. RISK & INS. 217, 228 (1969). In 1961 the United States Senate Judiciary Subcommittee on Antitrust and Monopoly reported that the no-file statutes "appear to be best designed to bring insurance rate regulation into conformity with the competitive requirements of the antitrust laws." S. REP. NO. 831, 87th Cong., 1st Sess. 115 (1961). After an extensive analysis of California's no-file system, the New York Insurance Department concluded: "Although there is no rating system which will be a panacea for all property and liability problems, a more competitively oriented no-filing law would appear to offer the most promising and constructive approach. It has worked in California for twenty years, and is working well in other states which have adopted it recently . . . ." N.Y. INS. DEP'T, *supra* note 95, at 144 (1969). The no-file system is in effect in about six states. *Id.* at 78.

98 Roddis, *Why a Competitive Rate Law?*, J. INS. INFO., March-April 1969, at 7, 9. *See also* 1969 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 356-57.

99 For example, California has a no-file system and virtually all 20 members of its rate regulatory staff work in the field. Roddis, *supra* note 98, at 7, 9.

CODE § 3901.07 authorizes the insurance department to "make an examination of the affairs of any insurance company doing business in this state as often as it deems expedient for the protection of the interests of the people of this state. . . ." Although the department has confined itself to determining the financial condition of insurers pursuant to this statute, it may empower the department to undertake rate examinations.

using uniform rate-making practices; it permits the prompt upward adjustment of rates when needed without politically motivated interference of the insurance department; and, through the field examination procedure, it permits detailed review of actual practices, making it possible to detect problems—such as unfair discrimination—that might otherwise go unobserved.[100]

Another deficiency of the Ohio Department of Insurance concerns the paucity of administrative guidelines for rate regulation. The rate rules that the department has promulgated relate primarily to mechanical requirements.[101] At present, materials are unavailable to assist anyone wanting to understand departmental practices and policies for rate matters. The lack of guidelines creates waste and delay in the regulatory process and virtually eliminates the opportunity for public attention to focus on the department's processes. Informality, which attends the bulk of administrative adjudication in most agencies, precludes adverse publicity by allowing considerable latitude for compromise.[102] However, because of the lack of departmental rules, formal orders, or opinions resulting from hearings or judicial decisions, there has been inordinate reliance on informal, unreviewable action. With each matter handled on an ad hoc basis, regulation becomes uneven; confidence in the contours of departmental practices and policies is undermined; and statutory rate provisions become irrelevant. Certainly, more directives setting forth department policy are needed, as are a willingness to conduct hearings[103] and to issue written opinions that provide meaningful precedents.

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[100] *See* N.Y. INS. DEP'T, *supra* note 95, at 112-28; address by Kai-Kee, *Twenty Years' Experience under California's Rating Law*, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, Nov. 17, 1966.

[101] *See* OHIO INSURANCE DEPARTMENT, BULLETIN NOS. 16, 26, 28, 34-01, 45.

[102] One commentator has estimated that ninety percent of a regulatory agency's power is exercised by methods other than formal adjudication or rule making. 1 K. DAVIS, ADMINISTRATIVE LAW 233 (1958). For Ohio insurance rate regulation activities, the figure is almost one hundred percent.

Certainly differences of opinion between regulators and the regulated should be resolved, whenever possible, through conference and negotiation rather than by formal hearings and litigation. Formal hearings and litigaton are not only slow but expensive as well. Furthermore, the adversary process with its rules of procedure and evidence may circumscribe a practical determination of the merits of a particular rate matter. Nevertheless, it is naive to believe that all issues are resolvable by informal conference and negotiation. Indeed, one should expect some differences of opinion to be resolved by formal proceedings if the state is affirmatively facing its responsibilities. Litigation and formal hearings in other states concerning rate matters suggest there are real differences of opinion concerning interpretation of the laws.

[103] In over twenty years the department has conducted only seven hearings. Three—of which the department has no record—were held between 1953 and 1957. S. REP. NO. 831, 87th Cong., 1st Sess. (1961). One, in 1958, involved a deviation filing of the Insurance Company of North America. OHIO DIRECTOR OF INSURANCE, 92d ANNUAL REPORT vii (1958). Another, in February 1967, involved the National Bureau of Casualty Underwriters. *See* note 106 *infra*. Two, in June and October 1968, involved a filing by the Transportation Insurance Company. Response to questionnaire of the Ohio Legislative Service Commission, *supra* note 55.

IV. Procedures Governing Rights of Insureds

A. *Legislative Provisions*

Although the Ohio Revised Code has not neglected the insured entirely, the adequacy of the applicable sections is questionable, especially in light of the department's limited activity in rate regulation. Sections 3935.09 and 3937.08 of the Code require every rate bureau or insurer that makes its own rates to furnish upon the request of "any insured affected by a rate made by it . . . all pertinent information as to such rate" and to provide "reasonable means by which any person aggrieved by the application of its rating system may be heard "concerning" the manner in which such rating system has been applied in connection with the insurance afforded him." To obtain the information, the insured making the request must first pay "such reasonable charge" as the bureau or insurer may determine.[104] Should the insured request a hearing about the application of the rating system, the hearing is conducted by the partisan bureau or insurer. Furthermore, the statutes do not seem to authorize an appeal from the hearing, although they do permit an appeal to the director of insurance if the insured's request for information or a hearing is denied. Moreover, the statutes are silent about remedies of the insured "aggrieved by the application of its [the bureau's or insurer's] rating system."[105]

Other sections which would seem to afford redress to the "aggrieved" insured are likewise limited. Under sections 3935.05(D) and 3937.04(B) of the Ohio Revised Code any person or organization, other than the insurer or rate bureau that made the filing, "aggrieved with respect to any filing which is in effect" may request the director of insurance to conduct a hearing. The director must proceed if he finds (1) that the request is made in good faith, (2) that the applicant would be aggrieved if his grounds are established, and (3) that the alleged grounds otherwise justify a hearing. After the hearing the director may withdraw the filing if he finds that it does not comply with all relevant statutory provisions. However, since the withdrawal operates only prospectively, relief is of limited value. By the time the director conducts a hearing and renders his opinion (and perhaps a court considers an appeal), the matter may be moot, since a new filing may be in effect.[106] This would be the usual result in most

104 The provisions seem to deal only with misclassifications of insureds. Code sections 3935.05(D) and 3937.04(B) speak in terms of failure of a filing to comply with the entire applicable chapter, whereas sections 3935.09 and 3937.08 speak only of the way a rating system is applied to the individual insured.

105 Code §§ 3935.09, 3937.08.

106 In *Ohio AFL-CIO v. National Bureau of Casualty Underwriters*, No. 9196 (Ct. App. Franklin Co. Aug. 2, 1969), *appeal dismissed*, 43 Ohio Bar 130 (Sup. Ct., Jan. 28, 1970), the rates reviewed were filed in November 1966. The director of insurance conducted a hearing in February 1967 and issued an opinion in May 1967. In April 1968 the Common Pleas Court of Franklin County, Ohio, affirmed the decision of the director. The Franklin County Court of Appeals dismissed an appeal in August 1969, on the ground that the "rates objected to by ap-

rate challenges, because rate filings are generally made every year, especially for casualty insurance.

There may be an additional limitation to sections 3935.05(D) and 3937.04(B) of the Ohio Revised Code. According to a recent opinion of the Court of Common Pleas of Franklin County, Ohio,[107] policyholders may not have a court review the director's decision on a challenged casualty rate filing. The court ruled that Chapter 3937 of the Code makes no provision for policyholder appeals. It determined that because section 3937.15[108] expressly permits appeals by any "insurer or rating organization aggrieved" by the director's order or decision, insureds cannot bring appeals under this section. The court also held that policyholders may not appeal rate matters under the Ohio Administrative Procedure Act[109] because, in acting upon rate filings, the director "has no authority in law to adjudicate such filings," his authority being "limited solely to determining compliance with Chapter 3937."

Although the reasoning of the court is unclear and its conclusions assailable, the decision presents a roadblock to insureds wanting to challenge rate filings in the courts, especially since the decision is the only one in Ohio interpreting the insurance rate regulatory provisions. The decision leaves open the question whether insureds are within the category of "aggrieved persons" when the term is otherwise undefined in the various sections of Chapters 3935 and 3937 of the Ohio Revised Code.[110] Sections 3935.05 and 3937.04 (authorizing any aggrieved "person or organization" to request a hearing) do not specify whether insureds are aggrieved persons, although sections 3935.09 and 3937.08 (allowing "insureds" to appeal to the director when an insurer or rating organization fails to supply requested information) refer expressly to insureds. Arguably, an insured

pellants have been supplanted by new rate filings" and "no judgment could be rendered to 'roll the rates back' or to collect back, on behalf of any insured, any premium so paid while such protested rates were in effect." Thus, the Court of Appeals concluded that the case should be dismissed for being moot. These opinions are the only ones by Ohio courts concerning chapters 3935 and 3937 of the CODE.

107 Ohio AFL-CIO v. National Bureau of Casualty Underwriters, No. 230,476 (C.P. Franklin Co., April 3, 1968).

108 Since the issue involved a casualty rate filing, the court focused only on chapter 3937. The appeals provision in chapter 3935, section 3935.14, is considerably more detailed than section 3937.15, but similar to section 3937.15; it authorizes appeals by "any insurer, advisory organization, or rating bureau" aggrieved by the director's order.

109 CODE § 119.12. *See also* CODE § 3901.041.

110 *See* Insurance Dep't v. Philadelphia, 196 Pa. Super. 221, 233 n.3, 173 A.2d 811, 817, n.3, (1961). McCullough, *Insurance Rates in the Courts: Part I*, 1961 INS. L.J. 381, 391-92. "There is considerable difference of opinion among state . . . officials as to who would be considered an aggreived party under the provisions of their laws." 1960 PROCEEDINGS, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS 107. *Cf.* Comment, 58 MICH. L. REV. 730, 731 n.6, 737-53 (1960).

In a hearing on a casualty rate filing of the Transportation Insurance Company on October 21, 1968, the department allowed the Ohio Association of Independent Agents to challenge the filing as an aggrieved party under CODE section 3937.04(B). *Contra*, Virginia Ass'n of Ins. Agents v. Virginia, 201 Va. 249, 110 S.E.2d 223 (1959).

cannot be an aggrieved person under sections 3935.05 and 3937.04, since insureds have remedies only under those sections which expressly provide for them.

B. *Consumer Oriented Reforms*

With insured choices limited to cancelling coverage with one insurer and placing his business with another, to complaining to an insurance department which is generally sympathetic with the industry in rate-matters, and to requesting a hearing before the insurer or bureau, the property and casualty enterprise is virtually insulated from policyholders. Yet, little attention has been given to insureds' need for a voice in rate making or rate regulation. Arguably, the state insurance department represents customer interests, but this viewpoint may be more an expression of the Jacksonian philosophy of democracy than of actual practice.

This is the era of "consumerism"[111]—a label which describes such aims as fostering public awareness of and sophistication about available products and services, providing direct, effective means of remedying consumer injustices, and of allowing buyers to express their views to both producers and regulators with confidence that such views will be thoughtfully considered and, if legitimate, acted upon. At present, the insurance consumer is virtually impotent. Not only is he ignorant of the rate-making and rate regulatory processes, but also, he has no effective way of expressing his views or of obtaining relief. Until consumer interests are given greater recognition, they will stand as the most neglected of the several goals of rate regulation.

In addition to amending the existing provisions to remove the restrictions just discussed, there are other ways of allowing consumers a greater voice in property and casualty insurance rate-making and rate regulation. These range from an insurance department advisory committee to legislation permitting class actions.

The basic function of an advisory committee is to provide a vehicle by which diverse interests and opinions may be heard. It permits a dialogue which not only may result in tapping the expertise and opinions of interested persons, but may also lead to a better appreciation of particular problems and viewpoints so that legitimate interests will not be violated. Over a dozen advisory committees have been appointed pursuant to the

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[111] *See* Whitford, *The Age of Consumerism*, BEST'S REVIEW, June 1969, at 38 (property-liability ed.); BUSINESS WEEK Sept. 6, 1959, at 94.

Some individuals look upon "consumerism" as meaning a chauvinist attitude toward the public by politicians. In C. KULP & J. HALL, CASUALTY INSURANCE 422 (4th ed. 1968), the authors remark: "Finally, politically motivated persons, taking a page from the private enterprise book of philosophy, have learned that consumer issues are supreme in their vote-getting potential. . . . [I]t must be expected that *every fault will tend to be exaggerated far beyond its rational proportions.*"

Ohio Revised Code,[112] a few of which have "public" representatives.[113] Several drawbacks of advisory boards, however, are substantial and may militate against their creation in the insurance area. If an advisory committee's size is to remain reasonable, representation of different viewpoints is difficult, if not impossible. Selection of "public" representatives can readily develop into a system for rewarding party faithfuls. Absent adequate budget and staff support, which the legislature has been unwilling to authorize for such groups, the committee becomes little more than a discussion body whose influence is negligible. Finally, many persons outside the insurance industry are not organized with spokesmen to represent their interests. This may cause the consultive process to operate unfairly since not all viewpoints will be effectively presented.[114]

Another means of achieving greater public representation in insurance rate regulation is the appointment of a "people's counsel." Arguably, this counsel could represent the interests of all consumers in insurance rate regulatory matters, providing a force to counterbalance the property and casualty industry.[115] The concept of a "people's counsel" presupposes that all consumers have a unified interest which may be presented by one advocate or a limited number of diverse interests which may be presented by several advocates. To the contrary, property and casualty insurance consumers are highly heterogeneous. With rates being determined on the basis of classification of insureds, their interests in rate regulation are disparate and fractionalized.[116] Although a people's advocate may be effective in such areas as consumer frauds (where the public's interest tends to be monolithic), for insurance rate regulation the idea seems impracticable.

Before an insured, or group of insureds, can assert a claim there must be an awareness that one exists. Most individuals know little about the property and casualty insurance enterprise. Indeed, many persons are undoubtedly intimidated by the complexity of the product and hesitate to expose their ignorance in trying to obtain information about rates, coverages, and services of companies. Neither the insurance department nor in-

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112 Section 121.13 authorizes departmental directors, with approval of the governor, to appoint advisory groups to aid them in conducting their work. *See also, e.g.*, CODE §§ 1503.40, 3701.36.

113 These committees are listed in T. BROWN, OFFICIAL ROSTER OF FEDERAL, STATE AND COUNTY OFFICERS AND DEPARTMENTAL [Ohio] INFORMATION 360-98 (1969).

In 1961 a governor's advisory committee met twice to consider and suggest insurance legislation. The committee was appointed in 1958. OHIO DIRECTOR OF INSURANCE, 95th ANNUAL REPORT viii (1962).

114 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 366 (1958).

115 People's counsel has been appointed in insurance rate proceedings. For example, in 1968 policyholders were represented by a state-appointed public defender in a New Jersey hearing on automobile liability rates. Wall St. J., Feb. 2, 1968, at 34, col. 1 (midwest ed.).

116 *See* Insurance Dep't. v. Philadelphia, 196 Pa. Super. 221, 228 n.3, 173 A.2d 811, 817 n.3 (1961).

surers provides the public with information about the types of insurers offering coverage, the kinds and costs of available coverage, the rights of policyholders under the rate regulatory statutes, or the activities and services of the department. The information insureds do receive concerning the property and casualty insurance industry is mainly in the form of sales information or industry sponsored advertising,[117] advertising which, as one observer has said, "can itself be seen as opposed to the public interest."[118] In short, the insurance industry should not, and cannot, be relied upon to inform the public. How then should insureds become informed?

One possibility is to have the insurance department conduct public hearings on major bureau, deviation, and independent rate filings. Such hearings would also present an opportunity for members of the public to express their views. The effectiveness of public hearings, however, is hampered by several limitations. First, rate filings involve such highly technical matters that the public may fail to become interested in the hearings. Second, the department may not be receptive to insurer views because it may feel that any needed information may be obtained from the bureau or insurer prior to the hearing. Third, public hearings may fail to develop the department's position because generally it does not offer any evidence during proceedings it conducts. Fourth, the department may tend to emphasize prevention of rate increases in order to gain popular support for itself and the incumbent political party.[119]

In view of the limitations associated with public hearings, a more effective method of informing the public might be accomplished through a department-sponsored consumer information program. While consumers have always been the primary beneficiaries of the insurance department's work in rate regulation, the department has nevertheless concentrated on policing insurers rather than on educating consumers. At present, the three means used by the Ohio Department of Insurance to educate consumers are virtually worthless. One means is the publication of an annual list of

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[117] Reportedly the Ohio Insurance Institute, composed of a number of insurance companies, spends approximately $200,000 a year for newspaper advertising. The advertising is aimed at generating public support for the property and casualty insurance industry. *See, e.g.*, the Institute's ad in the Columbus Dispatch (Ohio), April 29, 1969, at 6A, entitled, "What You Should Know About Auto Insurance Profits;" and, "Sure . . . Auto Insurance Rates Are Up! But Be Glad You Live in Ohio" in the Plain Dealer (Cleveland, Ohio), Jan. 21, 1969, at 15.

[118] Smith, *The Miscegenetic Union of Liability Insurance and Tort Process in the Personal Injury Claims System*, 54 CORNELL L. REV. 645, 703 (1969).

In South Carolina the state insurance department sought court authority to restrain insurer propaganda on public issues affecting the industry. *Id.* at 703 n.223.

Recently the Wisconsin Insurance Laws Revision Committee proposed that insurers be required to send to the insurance commissioner a copy of any communication distributed generally to policyholders. This gives the commissioner an opportunity to order insurers to revise the materials or inform policyholders of the facts himself. Pfennigstorf, *Enforcement of Insurance Laws*, 1969 WIS. L. REV. 1026, 1062.

[119] *Cf.* Williams, *Insurer Views on Property and Liability Insurance Rate Regulation*, 36 J. RISK & INS. 217, 230 (1969).

companies licensed to write coverage in the state;[120] another is the publication of statistical data taken from the annual statements of insurers filed with the department;[121] a third is acceptance and action on consumer complaints filed with the department.[122] The information contained in the two publications is of little practical use, and the complaint procedure—although admittedly it may serve to educate consumers by way of feedback concerning the handling and disposition of their inquiries—is limited by the education process itself: A consumer must be aware of his right to complain, know what he is complaining about, and be informed of where to complain.[123] Too few Ohio insureds are so sophisticated.

The Ohio Department of Insurance is capable of giving recognition to the new status consumers want.[124] It can do this through a well conceived consumer information program. For example, the department could prepare and disseminate materials to consumers describing the property and casualty insurance industry, including differences among insurers, their differences in coverage and rates offered, and the regulation of those rates by the state. In conjunction with this program the department could prepare a consumer newsletter,[125] containing easily understandable summaries of departmental activities and informing consumers of their rights. Initial circulation of the newsletter could include the press, consumer organizations, and public and scholastic libraries. Going a step further, the department could make itself more accessible to the public by opening branch

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120 DIRECTOR OF INSURANCE, LIST OF INSURANCE COMPANIES AUTHORIZED TO TRANSACT BUSINESS IN THE STATE OF OHIO.

121 DIRECTOR OF INSURANCE, ANNUAL REPORT. In recent years this report has become nothing more than a statistical repository consisting of over 200 pages of figures. Several years ago annual reports described the organization of the insurance department, presented data showing departmental activity, outlined recent insurance legislation, and described the Ohio insurance industry, including the concentration of business. *See, e.g.*, OHIO DIRECTOR OF INSURANCE, 95th ANNUAL REPORT (1959).

Reports of the department are required pursuant to sections 149.01 and 3901.14. *See also* CODE § 121.18. The department recently appears to interpret these provisions as only requiring the tabulation of statistics it publishes in the annual report. Section 149.01 requires a more elaborate report but not its publication. In the past, however, the department has published the section 149.01 report. The information the department must report pursuant to section 149.01 includes a summary of departmental transactions and proceedings and departmental suggestions and recommendations. Perhaps section 149.01 should be amended to require publication of reports made pursuant to the section.

122 The department receives about 3,000 consumer complaints or inquiries a year. Ohio Leg. Serv. Comm., Complaints on Property Hazard Insurance Cancellations and Non-renewals, Appendix II, Oct. 16, 1968 (unpublished memorandum).

123 There is only one place to file complaints concerning insurance matters: the insurance department's office in Columbus.

124 *Cf.* Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 AD. L. REV. 279, 293-94 (1967).

Recognition of consumer interests may result in a significant benefit. "[A] well-considered and carefully designed publicity program can contribute considerably toward making policyholders more careful in their dealing with insurers, reducing complaints, and in general alleviating the commissioner's task of regulating the business." Pfennigstorf, *supra* note 118, at 1063.

125 Starting in the late 1950's and continuing until the late 1960's the department published a newsletter periodically. The newsletter was directed toward the industry, not consumers.

offices outside Columbus[126] or by providing toll-free telephone service from anywhere in Ohio to the department's offices in Columbus. Increased accessibility of the department would afford consumers a greater opportunity to file complaints and to obtain information,[127] while providing a means whereby the department may become more aware of the needs and concerns of insureds.

Another way of advancing the interests of insureds is through class actions.[128] Class actions coupled with rate roll backs, refunds, and recovery of expenses would be an effective way of assuring sufficient incentive for policyholders to enforce their rights.[129] How the class action may benefit

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[126] The Florida insurance department, for example, maintains 21 field offices, each in one of the state's population centers. INSURANCE, June 21, 1969, at 56.

[127] *See* NATIONAL ADVISORY PANEL ON INSURANCE IN RIOT-AFFECTED AREAS, MEETING THE INSURANCE CRISIS OF OUR CITIES 108 (1968).

Consumer complaints could be made public, if proper safeguards were used. For example, legislation could provide that complaints by insureds would be made public provided permission of the person filing the complaint is obtained and then only after the party complained about has had 30 or 60 days in which to file an answer. Information about complaints of insureds would enable consumers to make better choices.

The Consumer's Union recently reported policyholder reactions to the service of 25 casualty insurers. Consumer's Union sought to determine which insurers are most likely to pay claims promptly, courteously, and in full, which are least likely to cancel coverage, and which are least likely to increase rates sharply. The technique employed was a survey of Consumer Reports subscribers. 35 CONSUMER REPORTS 332 (1970). Consumer's Union has also reported on which coverages to buy and how to make price comparisons. 35 CONSUMER REPORTS 426 (1970).

[128] The possibility of class actions of insureds is a recent development. *See generally* Denenberg, *New Remedy for the Defrauded Insured*, TRIAL, Dec.-Jan. 1969-70 at 49. *Contra, Comment*, WIS. STAT. ANN. § 625.22 (West Supp. 1970) (discussing the theory that the insurance department's job is to protect the public). For an exhaustive analysis of consumer class actions see Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 BOST. L. REV. 211 (1969); Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 BOST. L. REV. 407 (1969).

Class actions in Ohio have been bolstered by new Rules of Civil Procedure, effective July 1, 1970. Ohio Rule 23 is virtually identicial to Rule 23 of the Federal Rules of Civil Procedure. *Compare* Fed. R. Civ. P. 23 *with* Ohio R. Civ. P. 23. *Cf.* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 497 (1969). Pursuant to Ohio Rule 24(B) the insurance department or its director has a conditional right to intervene "when a party to an action relies for ground of claim or defense upon any statute . . . administered by a . . . state governmental officer or agency or upon any regulation, order, . . . issued or made pursuant to the statute. . . ."

[129] Rate roll backs and refunds occur in the public utility area. *See, e.g.*, Illinois Bell Telephone Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939), where more than one million subscriber-claimants received about $17 million, with about 85 percent of the claims being under $25 each.

Rate refunds for property and casualty insurance have been endorsed recently in New York and Wisconsin. N.Y. INS. LAW § 179 2.a. (McKinney Supp. 1970); WIS. STAT. ANN. § 625.22(4) (West Supp. 1970).

Incentives for insureds to sue insurers for proscribed rate-making activities were in existence in the early 1900's. For example, an Alabama statute allowed insureds to recover a twenty five percent penalty, in addition to the actual damage suffered, if the insurer was connected with a rate bureau . The statute was upheld as a valid exercise of the state's police power in German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911).

In a number of jurisdictions legislation allows the award of attorney fees to private litigants who enforce rights arising out of a regulatory controversy. Stoeback, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202, 209-10 (1966). The allowance of such fees is not novel, especially when a fund is generated for the benefit of a number of persons. *Id.* at 207. *Cf.* CODE § 309.13 permitting the allowance of costs, including attorney fees, in the insured and at the same time enhance the regulatory scheme may be illustrated when a claim of excessive rates exists. Since such a claim for an individual insured generally involves a small sum of money, complex facts and intricate law, the expense of pursuing it greatly exceeds the potential recovery. Thus, there is little incentive to enforce rate regulatory standards. If a class action could be maintained, recovery in the aggregate would be substantial and incentive to question rates greatly enhanced. Class actions have two other advantages. First, representative claims capture public attention more readily than do private ones, and as public attention focuses on insurance rate regulation, insureds who have been ignorant of their rights or hesitant to enforce them may decide to act. Additionally, to avoid accusations of inactivity which would arise if there were a rash of policyholder suits, the Ohio Department of Insurance may become more vigorous in carrying out its responsibilities. Insurers may assert that this proposal will subject them to harassment from droves of policyholders encouraged in their efforts by selfish lawyers and others seeking to generate fees. The argument overlooks the fact that the basic purpose of rate regulation is to protect the public. If the rate regulatory standards are violated certainly the public should not be precluded from seeking redress; spurious claims can always be dismissed by the department or the courts without undue expenditure of resources.

V. Conclusion

Unfortunately, "lethargy" probably best characterizes the regulation of property and casualty rates in Ohio. The statutes fail to provide the foundation for vigorous regulation, and the insurance department appears almost uninterested in administering existing provisions of the Ohio Revised Code. Reforms are needed, including especially stricter surveillance of rate bureaus and advisory organizations, statutory definitions of "excessive" and "inadequate," and effective remedies for insureds. Without such reforms rate regulation in Ohio will continue to be as weak as it has been since the existing system was established over twenty years ago.

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taxpayer's suits. FLA. STAT. ANN. § 627.0127 permits the award of attorney fees by courts upon a judgment or decree against an insurer in favor of an insured.